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No. 97-209

In The

Supreme Court of the United States

October Term, 1996

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY, ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey), STEPHEN W. TOWNSEND (intended to be the Clerk of the Supreme Court of New Jersey), THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN (intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners), THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION, and JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE PHILADELPHIA BAR ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE PHILADELPHIA BAR ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, the Philadelphia Bar Association respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner and respondents Supreme Court of New Jersey, Chief Justice Deborah T. Portiz, Stephen W. Townsend, New Jersey Board of Bar Examiners, and Samuel J. Uberman have consented to the filing of this brief. Respondents the New Jersey Institute for Continuing Legal Education and Joseph J. Hogya have not provided consent.

The Philadelphia Bar Association is the oldest chartered metropolitan bar association in the United States. Founded in 1802 by fewer than one hundred lawyers to create and maintain a law library for the city's legal community, the Association's membership now exceeds twelve thousand and its activities on behalf of Philadelphia lawyers are wide-ranging.

Throughout its long history, the Association has been deeply concerned about issues involving the practice of law and access to justice. In view of the geographical proximity of Philadelphia to New Jersey, a substantial portion of the Association's members has taken and passed the New Jersey bar exam, fulfilled the New Jersey legal education requirements, and is admitted to practice in New Jersey.

Yet, despite the geographical proximity and despite the fact that the Association's lawyers who are admitted in New Jersey are otherwise fully qualified to practice in

their sister state, the New Jersey rules preclude them from doing so unless they also have a *bona fide* office in New Jersey. There is no reciprocal measure in Pennsylvania – New Jersey lawyers who are admitted to the Pennsylvania bar and who have satisfied the Pennsylvania legal education requirements are free to practice in the courts of Pennsylvania, regardless of where their office is located.

The Association is deeply concerned about the economic, practical, and ethical constraints that the New Jersey *bona fide* office rule imposes on its members and on their ability to represent their clients. It is concerned that the *bona fide* office rule, while perhaps serving the purpose of protecting New Jersey economic interests, is severely burdening the free flow of commerce between Pennsylvania and New Jersey. And, because the Association's members in downtown Philadelphia are but a few miles and a fifteen-minute car or train ride from New Jersey, the Association is concerned that, despite recognizing that "it may be true . . . that the *bona fide* office requirement may include an element of economic protectionism," *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099 (3d Cir. 1997) (39a),[1] the Court of Appeals for the Third Circuit upheld the constitutionality of the *bona fide* office rule on so slender a reed as "attorney accessibility for clients, counsel and parties." *Id.* (21a).

In view of its abiding concern with the effect of the New Jersey *bona fide* office rule on its members, the

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[1] Citations are to the Appendix to the Petition for a Writ of Certiorari filed by Robert J. Tolchin.

Philadelphia Bar Association respectfully requests that it be allowed to participate in this case and to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus curiae* the Philadelphia Bar Association is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

In four cases decided in the 1980s, this Court established certain important guidelines with respect to state regulation of lawyers. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (New Hampshire residency requirement restricting state bar admission to New Hampshire residents is unconstitutional); *Frazier v. Heebe*, 482 U.S. 641 (1987) (invalidating local rule of the United States District Court for the Eastern District of Louisiana requiring lawyers who do not reside in the state to maintain an office in the state); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (Virginia rule permitting Virginia residents who are licensed to practice law in another state to be admitted to the Virginia bar solely on motion, while requiring nonresidents to take the Virginia bar exam, is unconstitutional); *Barnard v. Thorstenn*, 489 U.S. 546 (1989) (local rule of District Court of the Virgin Islands requiring that before an otherwise qualified attorney can be admitted to the Virgin Islands bar, the attorney must establish that s/he resides and intends to

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

continue to reside in the Virgin Islands is unconstitutional).

This case presents an opportunity for this Court to resolve an important question involving the state regulation of lawyers left open by its prior decisions – whether a state can require otherwise-qualified lawyers to maintain an office in the state in order to practice there.[2] In his concurring opinion in *Piper*, Justice White stated, "I would postpone to another day such questions as whether the State may constitutionally condition membership in the New Hampshire Bar upon maintaining an office for the practice of law in the State of New Hampshire." 470 U.S. at 289 (White, J., concurring). With this case, that day has come.

The New Jersey *bona fide* office rule prohibits any lawyer from practicing law in New Jersey unless, in addition to passing the bar examination and meeting all other requirements, the lawyer maintains a *"bona fide"* office within the state. *See* N.J.Ct.R. 1:21(a).[3] The rule has

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[2] In his petition for a writ of *certiorari*, petitioner presents the issues of the constitutionality of both the New Jersey continuing legal education requirement and the *bona fide* office requirement. *Amicus curiae* the Philadelphia Bar Association limits its brief to the *bona fide* office issue.

[3] The New Jersey *bona fide* office rule provides, in relevant part:

> [N]o person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State . . . and maintains a *bona fide* office for the practice of law in this State regardless of where the attorney is domiciled. A *bona fide* office is more than a maildrop, a summer home that is

been described as designed to "stop lawyers from Philadelphia and New York dead in their tracks as they seek to break into the New Jersey market without incurring major operating costs. And [the rule] is certainly needed to protect lawyers who regularly practice in the State, said New Jersey State Bar Association President Cynthia M. Jacob." *Rule Changes on the Money: Lawyer Office Regs Stiffened,* N.J. Lawyer, Aug. 5, 1996, at 1.

The Court of Appeals for the Third Circuit upheld the constitutionality of the *bona fide* office rule on the sole ground that the rule "has a rational relationship to the benefit of attorney accessibility for clients, courts, counsel and parties." *Tolchin,* 111 F.3d 1099 (21a). In view of the fact that the vast majority of Philadelphia lawyers maintain their principal office only one or two miles from the courts in southern New Jersey in which they practice, whereas lawyers in the northern part of the state practice some 80 miles from those same southern New Jersey

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> unattended during a substantial portion of the year, an answering service unrelated to a place where business is conducted or a place where an on-site agent of the attorney receives and transmits messages only. For the purpose of this section, a *bona fide* office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

N.J.Ct.R. 1:21-1(a)(1996) (80a-85a).

courts, the rule cannot be justified on accessibility grounds.

Indeed, the geography is such that many Philadelphia lawyers are *more* accessible to their New Jersey clients and to New Jersey courts than numerous New Jersey lawyers are. In reality, the rule targets Philadelphia (and New York) lawyers who – at least from the perspective of the New Jersey economic interests the rule seeks to protect – are perhaps all too accessible to New Jersey.

The *bona fide* office rule has one purpose and one effect: to prevent Philadelphia and New York lawyers from competing with New Jersey lawyers. *Certiorari* is warranted because of the fundamental effect such an in-state office requirement has on the practice of law, and because the Third Circuit's decision upholding the rule is flatly inconsistent with this Court's dormant Commerce Clause jurisprudence.[4]

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[4] This *bona fide* office rule also raises significant issues under the Privileges and Immunities Clause. While the rule ostensibly places the same burden upon residents and nonresidents of New Jersey (both groups are required to maintain a *bona fide* office in the state), because "the overwhelming majority of attorneys have their principal office in the state where they live," *In re Sackman*, 448 A.2d 1014, 1020 (N.J. 1982), the rule disproportionally discriminates against nonresidents. Although petitioner's questions presented may be broad enough to include the Privileges and Immunities Clause issue, in his brief he focuses on the dormant Commerce Clause issue. Accordingly, *amicus curiae* the Philadelphia Bar Association will do the same.

ARGUMENT

THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S CLEAR AND LONG-STANDING DORMANT COMMERCE CLAUSE JURISPRUDENCE.

The Commerce Clause contains "an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981). In analyzing state economic regulation under this "negative" or "dormant" aspect of the Commerce Clause, this Court has developed a two-tiered approach. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). "When a statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [this Court has] generally struck down the statute without further inquiry." *Brown-Forman*, 476 U.S. at 579 (citing *Philadelphia v. New Jersey*, 437 U.S. 617 (1978)). When, however, "a statute has only indirect effects on interstate commerce and regulates evenhandedly, [this Court has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The Court of Appeals' holdings – that the *bona fide* office rule: (1) does not favor in-state economic interests over out-of-state interests and so is not subject to heightened review; and (2) is justified under the less stringent Commerce Clause balancing test on the sole ground of

attorney accessibility – are flatly inconsistent with this Court's jurisprudence.

A. New Jersey's *Bona Fide* Office Rule Is *Per Se* Invalid Because Its Effect Is To Favor In-State Economic Interests Over Out-Of-State Economic Interests.

The Third Circuit rejected petitioner's argument that the *bona fide* office rule directly discriminates against out-of-state interests and so should be subject to heightened scrutiny under the Commerce Clause. According to the Court of Appeals, "it is reasonable to assume that the only attorneys actually burdened by this requirement are those who wish to maintain a small or sporadic practice in New Jersey [and] such attorneys may be New Jersey residents as well as nonresidents." *Tolchin*, 111 F.3d 1099 (16-17a). This conclusion, however, misconstrues the relevant Commerce Clause analysis.

While the rule's effect on resident and nonresident individuals is clearly an important element in a challenge under the Privileges and Immunities Clause, the relevant inquiry under the dormant Commerce Clause pertains to in-state and out-of-state *economic interests*, not residence. *See Brown-Forman*, 476 U.S. at 579. Even assuming *arguendo* that the *bona fide* office rule imposes burdens on resident and nonresident individuals evenhandedly (which it does not), it is not evenhanded with regard to in-state and out-of-state economic interests.

For purposes of the dormant Commerce Clause, law firms based in New Jersey constitute in-state interests, while firms based in Philadelphia or other nearby markets are out-of-state economic interests, regardless of

where the individual lawyers who comprise the firms reside. The *bona fide* office requirement thus imposes no burden on in-state economic interests, because New Jersey-based law firms, by definition, satisfy the office requirement.[5]

On the other hand, out-of-state interests, such as Philadelphia-based law firms that frequently represent clients in southern New Jersey, are saddled with the rather extraordinary burden of having to maintain a second office. Many firms are unable to bear the considerable costs of operating a "*bona fide* office" in New Jersey; small firms and solo practitioners are challenged simply to staff both offices; and even those firms that can afford a New Jersey office may have no reason or need to establish one. Moreover, because the vast majority of a Philadelphia firm's New Jersey litigation practice occurs in courthouses just a few miles from its Philadelphia office, New Jersey's office requirement imposes an expense that yields no benefit to counsel, clients or courts. Yet, without a New Jersey office, these firms are forced to refer their New Jersey cases to New Jersey firms – even when the client is located in Philadelphia and chooses to be represented by a Philadelphia lawyer, and even when the matter does not involve litigation.

Consider, for example, the effect of the rule on a lawyer who handled a single, non-litigation matter in

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[5] A lawyer whose office is in his or her home will satisfy the *bona fide* office rule as long as the office is a "functioning office" that meets the requirements of the rule. *See Tolchin*, 111 F.3d 1099 (17a).

New Jersey. The New Jersey Law Journal reports the following:

> When Daniel Herron died on July 13, 1992, leaving an estate in excess of $200,000, George Guyer Young, Jr., of Havertown, [Pennsylvania], the executor, hired his son, attorney George Guyer Young, III, to administer the estate
>
> The junior Young is admitted in New Jersey but has no office in the state, and did all the necessary work to distribute the proceeds of the estate to the 16 heirs, six of whom live in New Jersey.
>
> The lawyer received $16,000 and there is no record that anyone was unhappy with his work except one heir, a niece, Catherine McCorriston of Gloucester City, [New Jersey].
>
> She thought the fee was rather high and she also wasn't happy with the burial plans. Her uncle wanted to be buried in one cemetery, she said during an ethics hearing, and he ended up in another one.
>
> In the correspondence over these issues with Youngs, McCorriston noticed from a letterhead that the lawyer had no office in New Jersey so she filed a grievance and the District IV Ethics Committee followed with a complaint accusing Young of practicing without a bona fide office.

Does One Case Require a Bona Fide Office?, N.J.L.J., Nov. 20, 1995, at 13. After a hearing, the New Jersey Supreme Court ruled on the case, admonishing the attorney for practicing law in New Jersey without an office and imposing court costs. *See In re Young*, 675 A.2d 1117 (N.J. 1996).

The Third Circuit's decision cannot be reconciled with this Court's opinion in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Arizona statute challenged in *Pike* required all Arizona-grown fruit to be packaged and labeled before being shipped outside the state. A fruit producer objected to enforcement of the statute on the ground that the producer already maintained a California packing facility located just thirty-one miles away from its Arizona harvesting site. The producer argued that the statute imposed an unreasonable burden on interstate commerce because it required the company to build an expensive and unnecessary packing facility within Arizona.

This Court held that Arizona's interest in having the fruit identified as originating in Arizona could not constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in Arizona. *See* 397 U.S. at 145. Emphasizing that the statute may constitute an invalid restraint on commerce with respect to a particular company, even if it "does not impose such rigidity on an entire industry," 397 U.S. at 146, the Court concluded that:

> The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

397 U.S. at 145 (citations omitted).

New Jersey's *bona fide* office requirement imposes upon interstate commerce precisely the same burdens that were declared "virtually *per se* illegal" in *Pike*. Philadelphia firms that wish to practice law in New Jersey, like the fruit producers in *Pike*, are forced to open and maintain expensive and unneeded offices in New Jersey, even though such offices merely duplicate existing facilities located just a few miles away and even though the law firm's work could "more efficiently be performed" in the firm's Philadelphia office.

Moreover, in determining the extent of the burden placed upon interstate commerce, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989), *cited in Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992). Consider, in this respect, the draconian effect on interstate commerce that would occur if Maryland, Washington, D.C., and Virginia each had *bona fide* office rules like New Jersey's.

In sum, New Jersey's requirement that all lawyers maintain a *bona fide* office within the state subjects out-of-state economic interests to onerous, yet unnecessary, burdens, while imposing no burdens upon in-state interests. The principal effect of this requirement, and its principal purpose, is to favor New Jersey law firms by increasing the costs and inconveniences to Philadelphia (and New York) firms who wish to represent clients in New Jersey.

Thus, even assuming *arguendo* that the *bona fide* office rule is facially neutral with regard to resident and nonresident individuals, the rule is patently discriminatory with respect to out-of-state economic interests, and is therefore *per se* invalid under the dormant Commerce Clause.

B. Even If New Jersey's *Bona Fide* Office Rule Does Not Trigger Heightened Scrutiny Under The Commerce Clause, The Rule Is Nonetheless Invalid Under The Commerce Clause Balancing Test.

Even if the *bona fide* office rule were not virtually *per se* invalid under the dormant Commerce Clause, it does not pass constitutional muster under this Court's less stringent dormant Commerce Clause test. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). The burden the *bona fide* office rule imposes on interstate commerce has been discussed above. As will be demonstrated, that burden far exceeds any possible benefit to New Jersey.

Although in the courts below, the Supreme Court of New Jersey defended the rule as promoting lawyer competence, accountability, and accessibility, the Court of Appeals rejected the first two justifications. With respect to competence, the Court of Appeals, relying on this Court's decisions in *Frazier, Barnard,* and *Piper,* concluded

that, "[t]he Appellees have put forth no credible arguments as to why the *bona fide* office requirement would make an attorney more competent." *Tolchin*, 111 F.3d 1099 (20a). With respect to accountability, the Court of Appeals determined that, "[t]he Appellees [made] no compelling argument as to how New Jersey's *bona fide* office requirement is rationally related to attorney accountability." *Id.* (21a). The Third Circuit's holdings with respect to competence and accountability are fully consistent with this Court's precedent. *See Frazier v. Heebe*, 482 U.S. 641, 649 (1987) ("[T]he mere fact that an attorney has an office in [a jurisdiction] surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state bar."); *see also Barnard v. Thorstenn*, 489 U.S. 546, 555 (1989); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1985).

However, in considering the third justification offered for the rule – accessibility – the Court of Appeals disregarded this Court's precedent and upheld the *bona fide* office rule on the sole ground that there exists a "rational relationship between the *bona fide* office requirement and the intended benefit of attorney accessibility." *Tolchin*, 111 F.3d 1099 (21a). The Court of Appeals' holding is clearly at odds with this Court's determination that residency and in-state office requirements are "unnecessary and irrational" methods for ensuring attorney accessibility. *See, e.g., Frazier v. Heebe*, 482 U.S. 641, 646 (1987). Indeed, this Court has long recognized that there is no link between being located within a state and accessibility. *See Piper*, 470 U.S. at 286-87; *Frazier*, 482 U.S. at 650; *Thorstenn*, 489 U.S. at 554.

In *Piper*, for example, a Vermont resident who had passed the New Hampshire bar examination challenged New Hampshire's rule limiting bar membership to New Hampshire residents. New Hampshire sought to defend the rule as a means for ensuring attorney accessibility. Because the residency rule discriminated on its face against nonresidents, the Court in *Piper* assessed the rule's validity under the Privileges and Immunities Clause, not the dormant Commerce Clause. However, *Piper*'s reasoning is wholly applicable here.

This Court rejected the accessibility rationale, reasoning that, "[o]ne may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire." 470 U.S. at 286-87. Similarly, most lawyers will maintain their offices in reasonably convenient locations. That is, accessibility has little to do with the state in which a lawyer's home or office is located, because most lawyers will live and maintain their offices in places convenient to their clients and, if they are litigators, to the courts in which they practice. As *Piper* makes clear, a lawyer's accessibility to clients or to the courthouse is mostly a function of distance; the state borders that a lawyer may or may not cross en route to his or her destination are irrelevant to the lawyer's accessibility.

That is precisely why this Court in *Frazier* exercised its supervisory powers over the district courts to invalidate as "unnecessary and irrational" an Eastern District of Louisiana district court in-state office requirement, holding that the office requirement, like a residency requirement, was unjustified because "there is no link

between residency within a State and proximity to a courthouse." 482 U.S. at 650. Because, like New Jersey's rule, the Louisiana rule required "only that the attorney have an office somewhere in the State, regardless of how far that office is from the courthouse," it could not be justified on accessibility grounds. 482 U.S. at 650.

The court in *Frazier* also noted that "modern communications systems, including conference telephone arrangements, make it possible to minimize the problem of unavailability." 482 U.S. at 649. Today, a decade later, telecommunications technology is far more advanced than it was when *Frazier* was decided. Lawyers now are routinely accessible by cellular telephones, computer modems, facsimile machines, and electronic beepers. If an in-state office requirement was both "unnecessary and irrational" in 1987, then New Jersey's office requirement cannot possibly be justified on accessibility grounds today. *See Frazier*, 482 U.S. at 646.

Indeed, since *Piper* was decided in 1985, this Court consistently has rejected "accessibility" as a sufficient justification for such sweeping restrictions on the ability of lawyers to practice law in states in which they have been admitted to practice. Even the Virgin Islands' unique geographic isolation and accessibility concerns, together with its irregular airline and telephone service, were insufficient to justify its residency requirement. *See Barnard*, 489 U.S. 546, 554 (1989).

As a result of Philadelphia's proximity to New Jersey and recent advances in widely-used telecommunications technology, New Jersey's *bona fide* office requirement is not even plausibly justified by the state's interest in

ensuring attorney accessibility. To the contrary, Philadelphia (and New York) lawyers are completely accessible to New Jersey – more accessible, in fact, than many of their in-state colleagues are to clients and courts in other parts of the state. For these reasons, the *bona fide* office rule is invalid even under the more deferential dormant Commerce Clause balancing test.

CONCLUSION

Like the residency cases that this Court decided in the 1980s, this case is an important case involving state regulation of lawyers and the practice of law. The New Jersey *bona fide* office rule impermissibly restricts the practice of law, while providing no true benefit to New Jersey. *Amicus curiae* the Philadelphia Bar Association respectfully requests that this Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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